

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**BILL ALBRECHT**

Claimant

VS.

**HARSH OF DODGE CITY**

Respondent

AND

**LIBERTY MUTUAL INSURANCE CO.**

Insurance Carrier

Docket No. 236,608

**ORDER**

Respondent appealed Administrative Law Judge Pamela J. Fuller's Award dated May 22, 2001. The Board heard oral argument on December 4, 2001, by telephone conference.

**APPEARANCES**

Claimant appeared by his attorney, Henry A. Goertz. Respondent and its insurance carrier appeared by their attorney, Gregory D. Worth.

**RECORD & STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

The Administrative Law Judge determined claimant suffered a permanent partial general body disability and awarded a work disability. The respondent requested review of the nature and extent of disability and argues claimant suffered a scheduled rather than non-scheduled disability. Claimant argues the Administrative Law Judge's determination that he suffered a general body disability should be affirmed. Claimant additionally argues the percentage of work disability should be based upon a 100 percent wage loss.

**FINDINGS OF FACT**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

It is undisputed claimant suffered a work-related injury on November 4, 1997, and a separate work-related injury on March 3, 1998. These two claims are the subject of Docket No. 236,608.<sup>1</sup> An additional work-related injury was alleged on July 6, 1998, which was the subject of Docket No. 239,361. That Award was not appealed. The cases were consolidated for purposes of hearing but separate awards were written for each docketed claim. This is respondent's appeal from the Administrative Law Judge's decision in Docket No. 236,608.

On November 4, 1997, claimant was using a cutting torch and a hammer to repair an auger. After working for about an hour to get a piece of flighting onto the auger tube, claimant experienced a twinge of pain in his neck and shoulder which then left a burning sensation with numbness. The following day claimant was unable to move the fingers of his right hand nor move his right arm away from his side.

Claimant initially sought chiropractic treatment without relief of his symptoms. Claimant then received treatment from Guillermo Garcia, M.D. Dr. Garcia diagnosed claimant with radial nerve palsy which was confirmed by EMG and nerve conduction studies. Dr. Garcia treated claimant with different modalities such as splinting and physical therapy. Claimant was released to return to his regular work activities without restriction on February 5, 1998.

On March 3, 1998, claimant was putting a PTO on a transmission when the wrench he was using slipped and claimant's right thumb and wrist hit the transmission. Claimant was provided a wrist brace for this injury. Because claimant still complained of some tingling and paresthesia in the right upper extremity, Dr. Garcia referred claimant for additional EMG and nerve conduction studies.

On July 9, 1998, claimant visited Dr. Garcia complaining of a new injury in his shoulder joint from hammering at work on July 6, 1998. This alleged injury is the subject of Docket No. 239,361. Dr. Garcia diagnosed claimant with rotator cuff tendinitis.

On July 23, 1998, Dr. Garcia concluded claimant had reached maximum medical improvement for the right upper extremity injuries. Dr. Garcia opined claimant had suffered a 10 percent permanent impairment of function to the right upper extremity. The rating included the shoulder, right upper extremity, radial nerve palsy and the hand.

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<sup>1</sup> The parties stipulated that the November 4, 1997, date would be used for calculation of the award.

Claimant was referred for examination with Phillip R. Mills, M.D., on September 24, 1998, by his attorney. Dr. Mills diagnosed claimant with neck or right shoulder strain with a shoulder impingement syndrome. Dr. Mills opined claimant suffered a 9 percent impairment to the body as a whole which included 5 percent for the cervical strain.

The Administrative Law Judge referred claimant to Terrance C. Tisdale, M. D., for a court ordered independent medical examination. Dr. Tisdale diagnosed claimant with radial nerve palsy which he attributed to the injury on November 4, 1997. Dr. Tisdale testified the injury was at the level of the upper arm in the humeral area. As a result of that injury the doctor opined claimant had suffered a 15 percent impairment to the right upper extremity.

Dr. Tisdale also diagnosed claimant with residual wrist pain which he attributed to the injury on March 3, 1998. As a result of that injury the doctor opined claimant suffered no permanent impairment. Lastly, Dr. Tisdale diagnosed claimant with rotator cuff tendinitis of the right shoulder which he attributed to claimant's alleged injury on July 6, 1998.<sup>2</sup> As a result of that injury the doctor opined claimant suffered a 4 percent impairment to the right upper extremity.

#### **CONCLUSIONS OF LAW**

Initially, it must be determined whether claimant suffered scheduled or non-scheduled injuries as a result of his work-related accidents on November 4, 1997, and March 3, 1998. In the determination of whether the claimant has sustained a scheduled or a non-scheduled disability it is the situs of the resulting disability, not the situs of the trauma, which determines the workers' compensation benefits available.<sup>3</sup>

Although claimant initially complained of neck pain, the medical records of the treating physician, Dr. Garcia, mention those complaints only at the initial office visit. Thereafter, Dr. Garcia's medical records contain no further mention of neck complaints nor treatment for the neck. Dr. Garcia treated claimant through July 23, 1998. The doctor initially noted the possibility of a cervical disc as a differential diagnosis at the first office visit after the November 4, 1997, injury. However, the doctor concluded the EMG and nerve conduction studies eliminated a cervical disc as the cause of claimant's right upper extremity problems. Dr. Garcia testified:

Q. Having examined Mr. Albrecht on the several occasions that you did and following his course of care over time, did you conclude in any way whether

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<sup>2</sup> This pertains to Docket No. 239,361.

<sup>3</sup> *Fogle v. Sedgwick County*, 235 Kan. 386, 680 P.2d 287 (1984); *Bryant v. Excel Corporation*, 239 Kan. 688, 722 P.2d 579 (1986).

or not he had an impairment of function relative to his cervical spine because of the injuries he had presented to you?

A. My final disability rating includes just the right upper extremity.

Q. And is it your belief he did not then have an impairment to his cervical spine because of the injuries he has described to you?

A. That is correct, sir.<sup>4</sup>

Conversely, Dr. Mills diagnosed claimant with a cervical strain and opined claimant suffered a 5 percent impairment for that condition. However, the doctor conceded that the normal MRI of the cervical spine would tend to eliminate the possibility of nerve injury stemming from the cervical spine.

The Administrative Law Judge referred claimant to Dr. Tisdale for an independent medical examination. Dr. Tisdale specifically addressed the issue whether claimant had suffered a permanent impairment to his cervical spine as a result of the work-related injuries. The doctor testified:

Q. Your report contains reference to your examination of his cervical spine, your review of other diagnostic studies taken relative to his cervical spine. Doctor did you make a conscious decision as you prepared your report as to whether or not Mr. Albrecht had suffered any permanent impairment of function relative to his cervical spine?

A. Yes. When I come up with diagnosis, the way I do it is I kind of read through the history and read through my review of records and jot down notes indicating to myself what problems this man has had, and some of them I come up with a conclusion, this relates to injuries that he's incurred and those I deal with. Some of the things he complains of I don't think relate to the injuries and those I don't deal with. The cervical spine did come up and I don't even remember -- I do remember why it came up, because there were x-rays of it, there was an MRI of it and so on, and I looked at all of those. Those were normal. My exam of it suggested a little tightness but no specific pathology. There was really no report of an injury to the cervical spine so I decided that was not included in the injury and so I omitted it.

Q. And if I can try to summarize your comment, would it be fair to say that you did not feel that he had suffered injury or permanent impairment to his cervical spine in any of the three accidents he described to you?

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<sup>4</sup>Deposition of Guillermo Garcia, M.D., dated October 26, 1999, at 13.

A. Correct.<sup>5</sup>

The Board finds the opinions of the treating physician and the court ordered independent medical examiner to be more persuasive. Neither the diagnostic tests nor opinions of the treating and court appointed physicians support claimant's contention that he suffered a permanent neck injury as a result of the November 4, 1997, accident. Furthermore, the situs of the disability is in the right upper extremity above the forearm. Accordingly, the Board concludes that as a result of his work-related injuries the claimant suffered a scheduled disability to the right upper extremity at arm level.

It should be noted that Dr. Tisdale specifically apportioned his permanent disability ratings among the three injuries. Because the third injury to the shoulder is the subject of a separate docketed claim, the percentage of disability Dr. Tisdale rated for the shoulder is not included in this claim. As previously noted, Dr. Tisdale rated claimant's radial nerve injury, which resulted from the November 4, 1997, accident, at 15 percent to the right upper extremity. Dr. Tisdale additionally opined the claimant did not suffer any permanent impairment to his right hand and wrist as a result of the March 3, 1998, work-related accident. The Board adopts Dr. Tisdale's opinion and concludes claimant suffered a 15 percent permanent partial scheduled injury to the right upper extremity.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated May 22, 2001, should be, and is hereby, modified. An award is granted in favor of the claimant, Bill Albrecht, and against the respondent, Harsh of Dodge City, and its insurance carrier, Liberty Mutual Insurance Co., for an injury occurring on November 4, 1997, for a 15 percent impairment to the right upper extremity and based upon an average weekly wage of \$447.77.

Claimant is entitled to 26.57 weeks of temporary total disability compensation at the rate of \$298.53 per week totaling \$7,931.94, followed thereafter by 27.51 weeks of permanent partial disability compensation at the rate of \$298.53 per week totaling \$8,212.56, for a total award of \$16,144.50, all of which is due and owing and ordered paid in one lump sum as of the date of this award.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings contained herein.

**IT IS SO ORDERED.**

Dated this 31st day of May 2002.

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<sup>5</sup>Deposition of Terrance C. Tisdale, M.D., dated October 26, 1999, at 15-16.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Henry A. Goertz, Attorney for Claimant  
Gregory D. Worth, Attorney for Respondent  
Pamela J. Fuller, Administrative Law Judge  
Philip S. Harness, Workers Compensation Director